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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1982

No. _____

ICE CREAM INDUSTRY DRIVERS
AND ICE CREAM EMPLOYEES UNIONS PENSION
FUND ("THE ICE CREAM FUND"),

Petitioner,

v.

LUCIA NOVEMBRE And ANN DELUCA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether an oral representation by a union official, who is also one of ten trustees of a jointly administered Labor-Management Pension Fund, creates an estoppel compelling the Pension Fund to provide benefits that are forbidden by the Fund's written rules and regulations and federal law?

THE PARTIES

The Ice Cream Industry Drivers and Ice Cream Employees Unions Pension Fund (the "Ice Cream Fund") is the Petitioner, and was a defendant in the district court and an appellant in the Court of Appeals. The Respondents are Lucia Novembre and Ann DeLuca, who were plaintiffs in the district court and appellees in the Court of Appeals.

In addition to Petitioner, other defendants in the district court were Local 584; Local 680; the Local 584 Pension Trust Fund (the "Local 584 Pension Fund"); the Local 584 Welfare Trust Fund; the Ice Cream Welfare Fund; and three individual union officers: John Kelly, Larry McGinley and Tony Iorio. The district court found liability against Local 584, Local 680, the Local 584 Pension Fund and Petitioner. Local 680 and Petitioner appealed the district court judgment to the Court of Appeals

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LUCIA NOVEMBRE and ANN DELUCA,

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PETITION FOR A WRIT OF CERTIORARI
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THE OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey dated February 17, 1981, is reprinted in Appendix A of this Petition. The district court's opinion on rehearing dated May 7, 1981, is reprinted in Appendix

B of this Petition. The Judgment-Order of the United States Court of Appeals for the Third Circuit affirming the district court judgment is reprinted in Appendix C of this Petition. The opinions below are unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 29, 1982 (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 29 U.S.C. §§ 186, 1102 and 1104 are reprinted in Appendix D of this petition.

STATEMENT OF THE CASE

Petitioner, the Ice Cream Industry

Drivers and Ice Cream Employees Unions Pension Fund (the "Ice Cream Fund") is a multiemployer, joint union-management pension fund established pursuant to Section 302 of the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et. seq. Pursuant to the Taft-Hartley Act, union and employer-designated trustees have an equal say in the operation of the Fund. The union trustees are divided among representatives of two unions -- Local 757 and Local 680.

Respondents Novembre and DeLuca were employed prior to 1966 by Sealtest, a contributing employer to the Ice Cream Fund, and were represented for collective bargaining purposes by Local 680. In 1966, as a result of a corporate merger, they shifted their employment to Consumers Dairy, and

became represented by another union, Local 607, and later, as a result of a union merger, by Local 584. Contributions on their behalf were made by Consumers Dairy to the Local 584 Pension Fund.

In 1975, respondents applied for pensions from the Ice Cream Fund. Under the Ice Cream Fund's rules and regulations, the minimum number of years of credited service required for a regular pension was 30 years with an Ice Cream Fund employer. An early retirement pension was available at age 55 to those with 15 years of credited service. Neither respondent satisfied the requirements for either a regular or an early retirement pension. While they sought to be credited for purposes of calculating Ice Cream Fund service with the years during which contributions were made to the Local 584 Fund, the Ice Cream Fund lacked a reciprocal agreement with the Local 584 Fund.

Consequently, in accordance with the Ice Cream Fund's written rules and regulations, the Fund's trustees denied Respondents' pension applications.

Respondents then brought suit in the United States District Court for the District of New Jersey. While conceding their ineligibility under the Ice Cream Fund rules and regulations, Respondents contended that as a result of statements made at a dinner-meeting called by Local 680 in 1965, they were entitled to Ice Cream Fund pensions based upon the doctrine of estoppel.

At the dinner-meeting, Respondents claimed, and the district court so found, Lawrence McGinley, an officer of Local 680 who was also one of ten Trustees of the Ice Cream Fund, had told them they would be able to carry over their Ice Cream Fund service credits to their new

employer's pension fund.* Novembre and DeLuca contended that they had relied on these oral representations by remaining in the employ of Sealtest rather than seeking other work.

By an opinion dated February 17, 1981, the district court held the unions, Locals 584 and 680, liable for the money that Novembre and DeLuca would have received had there been a reciprocal agreement between the two Funds. However, relying on the then-unanimous rule in the Circuits,**

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*Similar assurances were alleged to have been made at the dinner-meeting by Tony Iorio, a Local 680 business agent and by Sid Bornstein, an officer of Local 607.

**The district court relied on Aitken v. IP & GCU-Employer Retirement Fund, 604 F. 2d 1261 (9th Cir. 1979); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 (9th Cir. 1976); Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969); and Phillips v. Kennedy, 542 F.2d 52 (8th Cir. 1976).

the district court refused to permit estoppel against the Funds.*

On May 7, 1981, following the Third Circuit's decision in Rosen v. Hotel & Restaurant Employees Union, Local 274, 637 F.2d 592 (3rd Cir.), cert. denied, 102 S.Ct. 398 (1981), the district court on rehearing reversed itself, and rendered judgment against the Funds for the full amount of pension benefits sought. The court also awarded attorneys' fees against Local 584 and the Local 584 Fund, but found that since the Ice Cream Fund and Local 680 had acted in good faith, they would not be liable for attorneys' fees.

The Ice Cream Fund then appealed to the United States Court of Appeals for the Third Circuit in No. 81-2362, and Local 680 appealed in No. 81-2363. The two

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*The district court did order the Funds to pay the respondents the employer contributions made on their behalf.

appeals were consolidated, and on July 29, 1982, the Third Circuit affirmed the district court judgment.

DISTRICT COURT JURISDICTION

Jurisdiction in the district court was proper under 29 U.S.C. §§185(a) and 1132(f).

REASONS FOR GRANTING THE WRIT

There are about two thousand multiemployer pension funds in the United States with aproximately eight million participants.* The question presented in this petition is of vital concern to all contributing employers, unions, trustees, and participating employees, as well as to those federal agencies responsible for ensuring that

*See Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, reprinted in Hearings on the Multiemployer Pension Plan Amendments Act of 1979, at 1149, 1155.

pensions be provided employees in conformity with the law.

A. Four of the Five Circuits that have Decided the Issue Have Refused to Estop a Pension Fund into Providing Otherwise Unlawful Benefits

Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186(c)(5)(B), makes pension fund contributions unlawful unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer...." See NLRB v. Amax Coal Co., 453 U.S. 322, 328 (1981); Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969).

The Employee Retirement Income Security Act (ERISA) also contains a

written agreement requirement. Section 402(a)(1) of ERISA mandates that: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. §1102(a)(1) (emphasis added). Section 402(b)(4) provides further that the plan shall "specify the basis on which payments are made to and from the plan." 29 U.S.C. §1102(b)(4) (emphasis added). Similarly, §404(a)(1)(D) imposes on plan fiduciaries the obligation to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter." 29 U.S.C. §1104(a)(1)(D) (emphasis added).

In addition to the written document requirements of the LMRA and ERISA, another fundamental aspect of the statutory scheme is the requirement that union and employer representatives must have equal say in all pension decisions. Labor Management Relations Act §302(c)(5)(B), 29 U.S.C. §186(c)(5)(B). Under §302(c)(5)(B), union representatives may not lawfully bind a fund without the concurrence of their employer conterparts. See NLRB v. Amax Coal Co., 453 U.S. at 328-29.

In order to effectuate the congressional mandates, every Circuit to address the issue, with the exception of the Third Circuit, has refused to apply ordinary rules of common law estoppel against a pension fund, where to do so would contravene the statutory requirements: (1) that employer and employee representatives have an equal say in the administration of a Taft-Hartley pension fund; and (2) that

benefits be provided only in accordance with the written documents and instruments governing the fund. See Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261, 1266-67 (9th Cir. 1980); Reiherzer v. Shannon, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978); Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1108 (9th Cir. 1976); Moglia v. Geoghegan, 403 F.2d 110, 116 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969). See also Van Gunten v. Central States, Southeast & Southwest Areas Pension Fund, 672 F.2d 586, 589 (6th Cir. 1982); San Pedro Fishermen's Welfare Fund Local 33 v. DiBernardo, 664 F.2d 1344, 1345 (9th Cir. 1982); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Pension & Supplemental Funds, 624 F.2d 1132, 1139 (2d Cir. 1980); Michota v. Anheuser-Busch, Inc., 526 F.Supp. 299, 317 (D.N.J. 1980);

Feathers v. UMW Health & Retirement Funds, 99 LRRM 2287, 2290 (D.D.C. 1978); Chamberlin v. Bakery & Confectionery Union, 99 LRRM 3176, 3180 (N.D. Cal. 1977); Hodgins v. Central States Southeast & Southwest Areas Pension Fund, 94 LRRM 2507, 2508 (E.D. Mich. 1976); Trucking Employees of North Jersey Welfare Fund v. Vrablick, 177 N.J. Super. 142, 425 A.2d 1068 (1980).

The courts have given a multitude of reasons for the refusal to apply estoppel. Some rely on the rule that "the doctrine of estoppel may not be invoked to compel an illegal act." E.g., Thurber, 542 F.2d at 1109. Some rely on the congressional intent to preclude eligibility other than in accordance with the written plan documents. E.g. Reiherzer, 581 F.2d

at 1267 n.1.* Still others refer to the danger of collusion or other illicit use of Fund assets if representations by one Fund trustee are permitted to bind the Fund. E.g., Moglia v. Geoghegan, 403 F.2d at 116:

> The reason for the rigid structure of Section 302 is to insure that employer contributions are only for a proper purpose and to insure that the benefits from the established fund reach only the proper parties. (citation omitted). Any erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted. (citations omitted).

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*"To allow the conduct or statements of persons entrusted with administering an employer-funded union pension fund to alter pension eligibility could seriously undermine the 'written agreement' requirement of Section 302(c)(5)(B)." Reiherzer, 581 F.2d at 1267 n.1.

> Our construction of Section 302 may work a hardship in the instant case...but we consider the construction of the statute that we have adopted is the only acceptable one in light of the congressional history and intent.

Finally, underlying most of the cases is a concern that to permit estoppel might jeopardize the "actuarial soundness" of the Fund by imposing liabilities unforeseen by the Fund's actuary. E.g., Phillips v. Kennedy, 542 F.2d at 55 n.8:

> "The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."

In Rosen v. Hotel & Restaurant Employees Union, Local 274, 637 F.2d 592 (3rd Cir.), cert. denied, 102 S.Ct. 398 (1981), the Third Circuit, referring to the above-quoted language in Phillips v. Kennedy, purported to carve out an exception to the general rule where there were

"more than mere assurances by the Trustees" and "'extraordinary circustances.'" Rosen, 637 F.2d at 598. Among the circumstances the Rosen court evidently felt were extraordinary were that the representations had been made by the Secretary of the Fund, and not just a single Trustee; that in addition to remaining in his job, Rosen, in reliance on misrepresentations had actually paid money out of his pocket to the Trustees; and that the Fund had confirmed in writing the misrepresentations relied upon.

The instant case goes beyond Rosen and permits the exception to swallow the rule. Here, the courts below found no extraordinary circumstances, but nevertheless ordered the Ice Cream Fund to pay pensions contrary to the written fund documents, based solely on oral statements found to have been made at a dinner-meeting

almost 17 years ago.

There was no evidence here that any of the Trustees representing Local 757 or the employers even knew about the dinner-meeting, let alone the promises found to have been made by the Local 680 representative. Nor was there any written confirmation of the misrepresentations. In such circumstances, the potential for fraud or collusion are immense.

A union trustee, anxious to obtain for his members benefits rejected at the bargaining table and by the employer trustees, could ensure those benefits merely by falsely proclaiming their existence. Similarly, an employer trustee, eager to obtain ratification by his employees of a meager contract offer, could assure them that additional pension benefits would be provided, notwithstanding the refusal of

the majority of Trustees to approve of such benefits.

In these cases, as well as other similar cases, the ability of the Fund to continue to provide benefits on a sound actuarial basis to those who are eligible under the rules of the Fund would be jeopardized.

Moreover, even if complete good faith is assumed, the potential for negligent misrepresentations is immense. Pension Fund documents are invariably complex, and ERISA is even more so. Fund trustees are generally laymen, unaware of the subtleties of the law. Under the Third Circuit rule, one misstatement by a single union official, however innocently made,* would result in the imposition of an unfounded liablity on the trustees.

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*The district court acknowledged that union trustee Larry McGinley's 1965 dinner-meeting statements had been made in good faith.

B. The Decision of the Court Below is Inconsistent with the Principles Underlying this Court's Decision in Schweiker v. Hansen.

The refusal of courts to apply estoppel against pension funds, absent extraordinary circumstances, reflects the necessity of balancing the interests of the individual against the interests of other beneficiaries, employer trustees and employers, governments agencies and the public at large. In the analogous circumstance of attempts to apply estoppel against the government, the Supreme Court has, since the Rosen decision, emphasized that oral representations standing alone cannot estop the government from enforcing its written rules. Schweiker v. Hansen, 450 U.S. 785 (1981).

In Schweiker, a Social Security official had erroneously and wrongfully informed the plaintiff that she was ineligible for benefits. As a result, she failed to file a written Social Security application in a

timely fashion as required by regulations. The Supreme Court refused to estop the government from relying on its requirement that applications be made in writing in a timely fashion. While the Court did not decide whether a government official's actions could ever estop the government from insisting upon compliance with valid regulations, the Court did hold that under the circumstances, the giving of misinformation orally falls far short of conduct that could possibly justify estoppel.

The policy justifications limiting estoppel against the government are virtually identical to those limiting estoppel against a pension fund.* In both cases,

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*The relative burden on the U.S. Treasury of providing benefits to Hansen was certainly far less than the burden imposed here on the Ice cream Fund. Moreover, since Hansen had satisfied all the substantive requirements for Social Security benefits, see Schweiker, 450 U.S. at 787, the actuarial consequences of estoppel were minimal. Here, of course, plaintiffs have failed to meet the substantive requirements for Ice Cream Fund pension eligibility.

estoppel would mandate performance that would otherwise be unlawful. In both, the interest of innocent third parties would be jeopardized. In both, the requirement that commitments be authorized and made in writing assures accountability and prevents collusion, favoritism, fraud, and false testimony about ancient events.

The entire statutory scheme of Taft-Hartley and of ERISA is premised on the reliability of written fund documents. Funds must satisfy elaborate disclosure provisions requiring that participants be advised of the terms of the plan. 29 U.S.C. §§1021, 1022, 1024. In addition, an annual report must be published, including actuarial evaluations of the written plan obligations. 29 U.S.C. §1023. Individual benefit statements must also be furnished to participants and filed with the Government. 29 U.S.C. §§1024, 1025;

IRC §6057. If benefits may be paid on any basis other than that provided in the written plan documents, participants, employers and unions will be misled by their reliance on the written plan documents.

Moreover, government agencies must rely extensively on the written plan documents. The Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation ("PBGC") all have oversight responsibility over pension fund benefits and revenues. If oral statements may estop a fund into providing benefits prohibited by the written fund documents filed with these agencies, the government will be unable to meaningfully evaluate the financial and actuarial status of a fund. Moreover, the PBGC is the ultimate insurer of certain minimum plan benefits. See, 29 U.S.C. §§1302, 1322, 1322a. If a

fund is rendered insolvent because of payments not foreseen in the written fund documents, the PBGC may be forced to assume certain fund obligations.

In Schweiker v. Hansen, the Court recognized the interest in observing the conditions defined by Congress for charging the public treasury. 450 U.S. at 788. There is an analogous interest in observing the conditions established by a fund's trustees for paying pension benefits. Accordingly, certiorari should be granted because the decisions of the courts below are inconsistent with the principles articulated in Schweiker v. Hansen.

CONCLUSION

It is respectfully requested that certiorari should be granted: (1) to resolve the conflict in the Circuits, and (2) to apply the principles articulated in Schweiker v. Hansen to pension funds established pursuant to the Labor Management Relations Act and ERISA.

Respectfully submitted,

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October 25, 1982

APPENDIX "A"
DISTRICT COURT OPINION
DATED FEBRUARY 17, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LUCIA NOVEMBRE AND ANN DELUCA,

Plaintiffs,

-v-

LOCAL 584 PENSION TRUST
FUND AND WELFARE
TRUST FUND, et al.,

Defendants.

HONORABLE H. LEE SAROKIN, U.S.D.J.:

The following facts are undisputed: Plaintiffs, Lucia Novembre and Ann DeLuca, are former employees of Consumer's Dairy and Sealtest and former members of defendant Local 680 and later of defendant Local 584, for whom pension benefit contributions were made by Consumers Dairy to defendant Ice Cream Industry Pension Fund and later by Sealtest to defendant Local 584 Pension Fund.

Defendant Local 584 Pension Fund is a separate, distinct and autonomous trust fund established pursuant to written agreement in compliance with the requirements of Section 302 of the Labor Management Relations Act of 1947 as amended and of the Employee Retirement Income Security Act of 1974.

It has a tax exempt status under the Internal Revenue Code.

Defendant Local 584 is a labor organization within the meaning of the Labor Management Relations Act, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Defendant Ice Cream Pension Fund is a separate, distinct and autonomous trust fund established pursuant to written agreement in compliance with the requirements of Section 302 of the Labor and Management Relations Act of 1947 as amended and of the Employee Retirement Income Security Act of 1974. It has a tax exempt status under the Internal Revenue Code.

Defendant Local 680 is a labor organization within the meaning of the Labor Management Relations Act, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Defendant John Kelly is a former officer of Local 584 and a former trustee of the Local 584 Pension Fund. He has not been served with summons and complaint in this action, and the matter was voluntarily dismissed as against him.

Defendant Larry McKinley was formerly an officer of Local 680 and defendant Tony Iorio was formerly an officer of Local 680.

The complaint was voluntarily dismissed as against both of said individual defendants. Therefore, the only remaining defendants are the two unions and the pension trust funds aforesaid.

This Court has jurisdiction by virtue of Section 301, 302 and 302 (e) of the Labor Management Relations Act. 29 USC Section 185, 186 and 186 (e).

Plaintiff Novembre was employed by the following employers who had a collective bargaining agreement with the union locals indicated below which agreement covered the wages, pension contributions and other terms and conditions of employment of Novembre with said employer, to wit, as follows:

From July 17, 1950, to October 1958 she was employed by Consumers Dairy in Union City and was a member of Local 680.

From October 1958 to January 1, 1966, she was employed by Consumers Dairy in Newark and continued membership in Local 680.

From January 1, 1966, to November 3, 1967, she was employed by Sealtest in Newark and was a member of Local 607, which union was later merged into Local 584.

From November 3, 1967, to June 6, 1970, she was employed by Sealtest in New York and continued with 607, and from June 6, 1970, to November 8, 1974, she continued to be employed by Sealtest in Jamaica and Long Island City, and was a member of 584 after its merger with 607.

Plaintiff DeLuca was similarly employed by Consumers Dairy at the place of business indicated above for the period November 1958 to January 1, 1966 and by Sealtest for the period January 1, 1966, to November 1st, 1974.

Within the respective periods mentioned above, plaintiffs Novembre and DeLuca were members in good standing of the aforesaid Locals, 584, 607 or 680 for the relevant time period.

At all times mentioned the successive and respective collective bargaining agreements between defendant unions and plaintiffs' respective employers required the latter to make pension contributions to the defendant pension funds.

Plaintiff Novembre's employer, Consumers Dairy, made contributions for and on her behalf to the defendant Ice Cream Fund during the period July 17, 1950, to January 1, 1966.

Her employer, Sealtest made pension contributions for and on her behalf to the Local 584 Fund during the period January 1st, 1966, to November 8th, 1974.

Plaintiff DeLuca's employer, Consumers Dairy, made pension contributions for and on her behalf to the Ice Cream Fund for the period November 1959 to January 1, 1966.

Her employer Sealtest made pension contributions for and on her behalf into the Local 584 Fund for the period January 1, 1966, to November 1, 1974.

The employment of plaintiff DeLuca and Novembre terminated on November 1 and November 8, 1974, respectively.

Local 584 Pension Fund and Ice Cream Industry Pension Fund are separate and distinct and autonomous trust funds established pursuant to separate written agreement in compliance with the requirements of Section 302 of the Labor Management Relations Act of 1947 as amended and of the Employee Retirement Income Security Act of 1974.

Defendant pension fund provides pension benefits in the form of normal or regular pensions, reduced pensions, early retirement pensions and similar types of

pensions pursuant to the terms of the rules and regulations of the fund.

The records of the respective pension funds show the amounts of pension contributions by employers and of credited service for each plaintiff.

Under the rules and regulations of the respective pension fund such records are the sole basis for determining each plaintiff's pension credit with respect to each pension fund.

Local 584 Pension Fund's records show that when plaintiff Novembre last worked for an employer covered by the plan in 1974 she was 55 years of age and had eight and three-quarters years of credited service.

Local 584 Pension Fund records show that when plaintiff DeLuca last worked for an employer covered by the plan in November 1974 she was 58 years of age and had seven and one-half years of credited service.

At the time plaintiff worked in employment covered by the Local 584 Pension Fund Plan the minimum requirements for obtaining a pension in Local 584 Pension Fund were for an early retirement pension for an employee who had attained the age of 55 and who had completed at least 15 years of credited service.

The minimum requirement for pension based upon service alone with regard to age at that time was at least twenty-five years of credited service. Neither plaintiff had the minimum credited service necessary to obtain a pension from the Local 584 Pension Fund pursuant to its rules and regulations.

Ice Cream Industry Pension Fund records show that when plaintiff Novembre last worked for an employer covered by the plan

in December 1965 she was 46 years of age and had 15 years and five months of credited service.

Ice Cream Industry Pension Fund records show that when plaintiff DeLuca last worked for an employer covered by the plan in December 1965 she was forty-nine years of age and had seven years and two months of credited service.

At the time plaintiffs last worked in employment covered by the Ice Cream Industry Pension Fund the minimum requirement for obtaining a pension from the Ice Cream Industry Pension Fund was for an early retirement pension for an employee who had attained the age of 55 and who had completed at least 15 years of credited service. The minimum requirement for a pension based on service alone with regard to age at that time was at least 30 years credited service.

Neither plaintiff met the minimum requirements for a pension from the Ice Cream Industry Pension Fund pursuant to its rules and regulations.

No express reciprocal agreement or other agreement of any kind exists permitting the Local 584 Pension Fund to grant either plaintiff any type of pension benefits based upon pension contributions made to the Ice Cream Industry Pension Fund by plaintiffs' employers or based upon pension credits earned by plaintiffs pursuant to the rules and regulations of the Ice Cream Industry Pension Fund.

No express reciprocal agreement or other agreement of any kind exists permitting the Ice Cream Industry Pension

Fund to grant either plaintiff any type of pension benefit based upon pension contributions made to Local 584 Fund by plaintiffs' employers or based upon pension credits earned by the plaintiffs pursuant to the rules and regulations of the Local 584 Pension Fund.

Plaintiffs were denied pension benefits by the Local 584 Pension Fund and by the Ice Cream Industry Pension Fund on the ground that they did not qualify for any type of pension provided by either pension fund and that no express reciprocal agreement or other agreement exists permitting either pension fund to grant either plaintiff a pension based upon pension contributions made to the other pension fund or based upon pension credits earned by plaintiffs pursuant to the rules and regulations of the other pension fund.

This case presents the following issues:

1. Whether any officer of either of the defendant local unions or any trustee of the defendant pension funds made any representation to either plaintiff concerning her eligibility for pension right;
2. Whether any of the individuals named in the complaint were authorized to speak for or bind defendant unions and pension funds;
3. Whether defendants Local 584 Pension Fund and Ice Cream Industry Pension Fund are bound or obligated by statements, if any, made on behalf of defendant Local 584 or Local 680 concerning eligibility or qualification for pension benefits;

4. Whether plaintiffs continued to work for Sealtest in reliance upon the statements allegedly made by the defendants;

5. Whether plaintiffs have been injured or damaged by defendants, and in particular the alleged misrepresentations.

All of the foregoing facts are undisputed. The factual dispute centers around a meeting which took place in the latter part of December 1965.

Plaintiffs at that time were employed by Consumers Dairy and there were rumors of a merger between Consumers and Sealtest. The employees were concerned regarding the consequences to them of such a merger.

Plaintiffs offered testimony regarding the meeting which took place in the latter part of December 1965. The meeting was described as "The Last Supper."

The testimony was that a dinner meeting was held at the Essex House in Newark. Dinner was preceded by a cocktail hour and was followed by speeches.

Representing Local 607 was Mr. Bornstein who was the secretary-treasurer of Local 607 and was a trustee of the Milk Industry Fund.

Representing Local 680 was Mr. McKinley, who was its president and who was also a trustee of the Ice Cream Industry Fund as well as the Milk Industry Fund.

Local 680 was also represented by Mr. Iorio, who was an officer of the union and its business agent, and he also was a trustee of the Ice Cream Industry Fund as well as the 680 Milk Fund.

All of the drivers, platform workers, plant and office workers who would be affected by the merger were invited.

Plaintiffs presented testimony that Mr. McKinley made a statement to everyone present that the employees would carry over their seniority, pay scale and pension credits from Local 680 into Local 607. He informed the audience that there would be no break in their pension benefits.

Plaintiffs also presented testimony that Mr. Iorio made a similar statement which was repeated by Mr. Bornstein.

In effect all three gentlemen reiterated that the employees would carry with them their pension benefits. There was no distinction made between what would transpire in respect to the benefits of the drivers as compared to the office workers.

That version of the meeting is confirmed by Mr. Hawkes and the deposition of Mr. Healey, who were present at the meeting.

After the public statements were made the plaintiffs had a private conversation with Mr. Bornstein and Mr. Iorio wherein they both confirmed and reiterated what had been stated publicly, namely, that the employees would carry their pension credits with them into the 607 Local.

Defendants presented a different version of the same meeting through Mr. McKinley. He testified that he knew prior to the meeting that the office workers were not covered by any reciprocal agreement and that they and the plaintiffs in particular would not be carrying their pension credits with them.

He testified that the meeting was not a dinner meeting, that there were no drinks served and that the meeting was scheduled for four o'clock in the afternoon. It was called by the union through oral communication to the shop steward.

Mr. McKinley concedes that he, Mr. Iorio and Mr. Bornstein were present.

He testified that he spoke at the meeting and discussed the fact that the employees would be transferred from Local 680 into Local 607, that all benefits would be transferred with the drivers, with the dairy workers, but not the office workers because there was no reciprocal agreement.

He testified that he confirmed that statement in a private meeting with the plaintiffs, Mr. Iorio and Mr. Bornstein, thereafter.

He testified that he and Mr. Bornstein informed the plaintiffs that although there was no reciprocal agreement in effect that they would try to obtain one and that they were optimistic that such agreement would be consummated.

All parties agreed that there were no further conversations between Mr. McKinley and the plaintiffs from that moment on.

As to the disputed facts and in particular what transpired at the meeting in December 1965, the Court makes the following findings of fact: The employees, including the plaintiffs, were concerned about the consequences of the proposed merger. They would and did ask at the meeting how the transfer from Local 680 to Local 607 would affect their seniority, wages, pension benefits, et cetera.

The Court accepts the version of that meeting as presented by the plaintiffs. The Court specifically finds that the persons who spoke for the unions were authorized to do so and had the authority, either express or implied, to do so.

The Court accepts the plaintiffs' version of the meeting because that meeting was of great importance to the plaintiffs, more so than to Mr. McKinley. It was the only such meeting that the plaintiffs ever attended, whereas Mr. McKinley attended many meetings. He testified that he attended one union meeting a month, two trustee meetings a month, and usually thrity-five other meetings during the course of a year, making an average of over seventy meetings a year.

But the dinner meeting was a very rare occasion for the plaintiffs and certainly one sponsored by their union.

Mr. Hawkes and Mr. Healey were independent witnesses with no interest in the outcome of this case. The defendants offered no one to support Mr. McKinley's version, not Mr. Iorio or anyone else who was present, and there was testimony that at least 40 other persons were present at that meeting.

There is also a serious doubt in the Court's mind whether McKinley would have mentioned the lack of reciprocity in respect to the office workers because he testified that he did not know if the office employees had a union contract.

If they did not have such a contract there would have been no occasion to discuss or even consider the existence of the reciprocal agreement.

Furthermore, Mr. McKinley could not remember any of the other details of what was discussed at that meeting. And in fairness to Mr. McKinley, that is certainly understandable. The incident occurred more than fifteen years ago. Plaintiffs would be much more apt to remember it because of the great importance to them.

I do not find that Mr. McKinley deliberately testified falsely, but I do find that the plaintiffs and their witnesses have a more accurate recollection of those events.

In addition, the plaintiffs version is born out by the subsequent events to be discussed hereafter.

After the conclusion of the meeting and for a long period of time thereafter the plaintiffs repeatedly asked Mr. Bornstein to confirm to them that their pension rights would be carried over into 607 and requested that such confirmation be furnished to them in writing.

His response was substantially the same on each occasion; they were advised not to worry about it, he said words to the effect, "I am here, you are entitled to it, you will get it, don't worry."

Although not particularly significant, the plaintiffs requested the 584 Pension Fund Booklet but never received it.

The Court further finds that Mr. McKinley did in fact try to obtain the reciprocal agreement which would have benefited the plaintiffs. He received a tentative informal approval by the Ice Cream Fund but the 584 Fund refused to enter into the agreement, as evidenced by D-7, minutes of the meeting dated September

12, 1972, a decision reached some five years after the 1965 dinner meeting and five years after the plaintiffs had steadily worked for Sealtest.

Most significant to the Court is the fact that even after both funds knew that there would be no reciprocal agreement, no one so advised the plaintiffs.

Therefore, the Court finds that there was a misrepresentation regarding plaintiffs ability to carry over their respective pension credits from Local 680 to Local 607, and that there was a failure to advise plaintiffs that the 584 Fund had refused to grant reciprocity when there was a duty to so inform plaintiffs.

Plaintiffs clearly relied upon the representations that were made to them. They commenced and continued their employment with Sealtest. They moved with Sealtest each time it moved to a point when plaintiffs were travelling to and from their employment for as much as four to five hours a day. They did not look elsewhere for employment because of the fact that they were satisfied based upon the representation that they would preserve their benefits by continuing in employment with Sealtest. Had they been informed at the end of 1965 that they could not and would not continue their pension credits they could have obtained employment with other employers having agreements with Local 680. There were eighty such potential other employers.

There is evidence that at least one other office employee from Consumers obtained such employment, a Lorraine Samer.

There is no requirement that the plaintiffs prove that they could have obtained a specific job at that time. That would be an unfair burden to impose upon the plaintiffs some fifteen years later.

As stated above, plaintiffs were never advised that the 584 Fund would not agree, and therefore, they continued to rely upon the representations made to them by remaining employees of Sealtest.

For the same reason the Court finds that they never filed any grievance because they were under the impression that there was no reason to do so, they were not advised of the decision regarding their pension benefits until they terminated their employment.

It is also significant that when Sealtest merged with a company called Delwood the plaintiffs elected not to continue their employment because they were advised that there was no reciprocity and that they could not carry their pension credits with them.

The Court finds that under these circumstances the reliance by plaintiffs was reasonable and that plaintiffs clearly sustained damages since they were denied their pension benefits.

The foregoing facts support plaintiffs claim of misrepresentation and estoppel, but the issue remains whether said facts create liability as against one or more of the defendants and whether the doctrine of estoppel is applicable to either the unions or the pension funds.

As to the pension funds, the trustees are required by applicable Federal Law to

administer the pension fund solely for the benefit of employees eligible for benefits under the pension plan. Aitken v. IP & GCS Employer Retirement Fund, 604 F. 2d 1261, Ninth Circuit, 1979; Thurber v. Western Conference of Teamsters Pension Plan, 542 F. 2d 1106, Ninth Circuit, 1976; Moglia v. Geoghegan, 403 F. 2d 110, Seocnd Circuit, 1968, Cert denied 394 US 919, 89 Supreme Court 1193, 1969.

Section 302 of the Labor Management Act of 1947, as amended, 29 USC 186, has been construed by the Courts to require strict compliance by pension fund trustees with the requirements of Section 302(c). In particular, pension trust funds must be established and maintained for the sole and exclusive benefit of employees, and their dependents, of contributing employers in accordance with a written trust agreement and pension plan. Pension benefits may be granted only to persons eligible under the trust agreement and pension plan.

Trustees of a Taft-Hartley Section 302 Labor Management Pension Fund cannot be estopped into the illegal act of paying pension benefits to ineligible persons; Aitken, Supra and Thurber, Supra. The Ninth Circuit, per curiam, rejecting Thurber's claim that equitable estoppel could be applied to prevent the pension fund from denying his eligibility for a pension stated:

> "The fact that Thurber relied on representations of an employee of the firm retained to administer the trust fund would not estop the pension fund and its trustees from denying Thurber's eligibility for

> the pension. The rights of other pensioners must be considered, and the trust fund may not be deflated because of the misrepresentation or misconduct of the administrator of the fund. We agree with the District Court that the doctrine of estoppel may not be invoked to compel an illegal act," 542 F.2d 1106 at 1109.

In Phillips v. Kennedy, 542 F. 2d 52, 1976, stated:

> "We are urged to decide this case on the basis of an estoppel allegedly created by the acceptance of payments made to the fund by Phillips' employer, assurances made to the president of Tri-State by a local union official and by a union trustee that Phillips would be included in the plan, the payment of retirement pension to an employee with similar status at Tri-State as Phillips and misleading statements in the brochure distributed by the fund describing pension rights. We decline to do so. The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan," citations omitted.

Plaintiffs rely upon the case of Carlsen v. Masters, 80 NJ 334, 1979, which supports their position, but it does not deal with the Federal policy concerns militating

against application of the doctrine of estoppel.

As stated during the colloquy with counsel this Court questions whether such policy considerations would bar all tort claims against pension funds. Certainly any tort recovery for negligence or fraud would require a payment other than to an eligible person. But since the representations involved in this matter go directly to the issue of eligibility, that distinction is not involved herein.

Therefore, the Court concludes that the doctrine of estoppel cannot be applied as against the pension funds, and the funds are not liable to the plaintiffs to pay pension benefits.

On the other hand, since the representations were made by persons who were representatives of the unions as well as representatives of the funds, the Court believes that it would not be appropriate for the funds to benefit from the wrong doing of the representatives.

Therefore, insofar as the funds are concerned, there will be a judgment in favor of the plaintiffs and against the funds to the extent of employer contributions actually made to the fund for the benefit of the plaintiffs, with interest. That determination applies to contributions made both before and after the misrepresentations were made.

As to the future contributions, there can be no dispute that employment was continued in reliance upon the representations that were made.

As to the past contributions, however,

as already stated, the misrepresentations caused plaintiffs not to take action they could have taken to receive the benefit of those past contributions.

As to the unions, the same policy considerations do not apply. Insofar as they are concerned this is a simple case of misrepresentation with all of the essential elements having been proved and the appropriate burden satisfied.

In Louis Schlessinger Company v. Wilson, 22 NJ 576, 585, 1956, the Supreme Court of New Jersey stated that the necessary elements for a fraud action are a false representation, knowledge or belief by the defendant of the falsity, and intention that the plaintiff act thereon, reasonable reliance in acting thereon by the plaintiff and resultant damage.

The Court has already indicated that there was a misrepresentation. Mr. McKinley admits that the representation was untrue in that he knew that there was no reciprocal agreement.

Those persons acting on behalf of the unions were authorized to do so. It was intended that the audience rely upon the representations.

Their reliance, as already indicated, was reasonable. And they sustained damages as a result of the loss of their pension benefits.

The Court might also add that even if the version of Mr. McKinley were accepted by the Court, namely, that plaintiffs were advised that there was no reciprocal agreement, but that the two funds would try to reach one, even when that fact was known

to both of the funds and to the unions, no one bothered to inform the plaintiffs, even though there was a clear duty to do so at the time.

So the failure to speak as of that moment was likewise a misrepresentation.

Therefore, based upon the foregoing judgment shall be entered in favor of the plaintiffs and against the unions for damages equivalent to the pension benefits plaintiffs would have received less the actual contributions plus interest to be paid by the pension fund.

The allocation between the unions shall be the same as though a reciprocal agreement had been in effect.

Interest shall be added to any part due payments.

The parties shall submit a judgment consented to as to form, including all of the calculations, in accordance with this opinion. The amounts due from the pension fund shall be applied against the past-due payments due to the plaintiffs.

As to future payments, plaintiffs may elect to receive a lump sum with appropriate reduction for present value or receive payment as contemplated under the pension plan. I would suggest that counsel discuss the matter and try to resolve the terms and calculations.

Now, Mr. Morgan, since you are the only person present, I would like you to undertake to discuss this with your colleagues, decide who will prepare the form of judgment. I hope it is clear what I have done.

I think the arithmetic might be a little complicated but I'm sure that you can work it out.

APPENDIX "B"
DISTRICT COURT OPINION
DATED MAY 7, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LUCIA NOVEMBRE AND ANN DELUCA,

Plaintiffs,

-v-

LOCAL 584 PENSION TRUST
FUND AND WELFARE
TRUST FUND, et al.,

Defendants.

HONORABLE H. LEE SAROKIN, U.S.D.J.:

After my decision in this matter the 3rd Circuit rendered its decision in the matter of Rosen v. Hotel & Restaurant Employees and Bartenders Union on February 23rd, 1981. I called that decision to the attention of counsel and requested that they advise me whether it warranted a reconsideration of my decision in this matter which had been rendered prior thereto.

Counsel have submitted briefs and plaintiffs have moved for rehearing predicated upon that decision.

Initially I followed the Court in the Phillips case which declined to apply the Doctrine of Estoppel against the defendant where the fund made assurances to plaintiff

that he would be included in the pension plan on the ground that the actuarial soundness of the pension fund is too important to permit the trustees to pay pension to persons not entitled to them under the express terms of the pension plan absent extraordinary circustances.

In the Rosen case the Court indicated that it was sensitive to the Phillips Court concern for actuarial soundness but held that actuarial soundness was not an issue in the case because contributions had been made in fact to the fund.

In this case the employers for the respective plaintiffs made actual contributions to the fund, and therefore, under the same reasoning, the actuarial soundness of the funds is not an issue in this case.

However, the Rosen Court nonetheless seems to indicate that there must be something more than reliance on mere assurances made by the trustees to create an estoppel even if actuarial soundness is not an issue in the case.

The Rosen Court held that by virtue of the fact that plaintiff furnished monies which were deposited into the fund's account, such deposits were classified or characterized as one of the "extraordinary circumstances" contemplated by the Phillips decision.

It is difficult for this Court to distinguish between the deposit of monies by the employees in the Rosen case and the reliance by the plaintiffs in this case in not seeking other employment which would have assured their pension rights and

travelling many hours to distant locations in order to preserve the rights which had been represented to them plus, of course, the actual contributions which were made by their respective employers into the fund.

As I indicated during the colloquy with counsel, the distinction, if any, does not go to the acts of reliance, but to the acts of the representatives of the fund. In both cases assurances were made of coverage but in the Rosen case a specific request was made for deposit into the fund sufficient to make up any arrears and a deposit was made pursuant thereto.

Therefore, in the Rosen case, the acts of the trustees were more than a mere assurance of coverage. A specific request was made for monies and payment was made in reliance thereon.

The theory of the Phillips case to the extent adopted by Rosen Court bars the use of estoppel where the actual actuarial soundness of the fund might be affected by its application; however, the Rosen Court indicates that a determination should be made in each case whether the actuarial soundness of the particular fund is affected by the application of the Doctrine of Estoppel.

Following the dictates of the Rosen Court in this case, the actuarial soundness is not affected by reason of the contribution of the respective employers of the plaintiff. Therefore, although the Rosen case seems to indicate that a finding of extraordinary circumstances is still required there does not appear to be any rationale for such a requirement.

The extraordinary circumstances suggested by the Phillips Court are necessary where the actuarial soundness of the fund may be affected, but where the actuarial soundness will not be affected there is no reason why the Doctrine of Estoppel should not be applied to pension funds in the same manner as it is applied to all other persons or entities.

Furthermore if extraordinary circumstances are demonstrated by "tangible detrimental reliance" this Court can see no distinction between the specific contribution made in the Rosen case and the facts that the plaintiff in this case did not seek other employment and travelled miles and hours to preserve the pension benefits which had been assured to them plus, as I have already indicated, the actual contributions made by the respective employers.

Therefore, the prior decision of this Court is hereby amended to impose liability on the pension funds for the full amount of the pension benefits to which plaintiffs otherwise would have been entitled, and the funds should be jointly and severally liable with the union defendants.

Past due payments, as already indicated, shall be with interest and the parties should calculate and allocate the future payment in accordance with this decision as amended.

I recall indicating in my earlier decision that I think plaintiffs should discuss with defendants whether or not they want the present value or whether they want future payments to be as though the reciprocal agreement had existed and

the pensions are in effect. If you can't work that out I will decide it, but I think that the numbers should be the same, it really ought to be up to the plaintiffs whether they want it now or whether they want future payments as though they were members of the fund from the outset.

In respect to the application for counsel fees, plaintiffs in this action seek attorney's fees on the basis of the alleged bad faith on the part of the defendants. Defendants object, stating there is no finding or showing of bad faith on their part.

I agree with Mr. Morgan's analysis, that the American rule with respect to attorney's fees is that each party should bear his or her own cost for attorney representation. Only where there is explicit statutory contractural or judicial authorization should Courts or may Courts award attorney's fees, citing Alaska Pipeline Service Co. v. Wilness Society [sic], 421 US 240, 1975.

There is, however, as both parties concede, judicial authority to allow recovery where there are overriding considerations such as bad faith.

In this case there is no statutory or contractural authorization for attorney's fees, therefore, bad faith must be shown in order to shift the burden of the fees. The Court may award attorney's fees only if the Court makes a finding of bad faith in the case as against one or more of the defendants.

I am satisfied, as I indicated during the colloquy on the motions, that in respect to the initial representations made to the plaintiff in this matter they were not made in bad faith. However, accepting either version of the facts, even including the version adduced by the defendants that the plaintiffs made repeated inquiry regarding their status and the defendants -- again, even accepting their version as true -- attempted to obtain the reciprocal agreement, there is no dispute that when the defendants made the final determination that there would be no reciprocal agreement no one communicated that information to the plaintiffs, even though there was a clear obligation to do so.

Again, accepting the defendants' version for the purpose of this argument, they insisted that they were advising plaintiffs that even though they didn't have a reciprocal agreement they were obtaining one and when the moment arrived when they knew that it could not be obtained no one undertook to advise the plaintiffs of that.

The Court determines that that constitutes bad faith, but only on the part of Local 584 and the 584 fund.

I don't think that the prior union or the prior fund's obligation extended into the future. I think that 584 fund and 584 Local had a continuing obligation. They knew of the plaintiffs' concern and were under an obligation, particularly when they had made the final determination, to make a disclosure to the plaintiffs.

Failing to do so the Court finds that constituted bad faith. And the 584 Local and 584 fund, therefore, are under an obligation to pay counsel fees.

In respect to the amount of counsel fees, I would prefer that counsel discuss the matter and see if they can't agree as to what a reasonable fee should be. If they can't what I usually do is refer it to the Magistrate to make a recommendation to me as to the appropriate fees.

It shouldn't be necessary in this case because counsel for defendants certainly know the amount of work Mr. New did in this matter and I would hope that they would stipulate the amount of counsel fees even though I recognize that the award is over their objection.

So I leave it to counsel now to draft a final judgment in accordance with this decision incorporating into it as I have already indicated; past due pension benefits with interest calculation and what is due in the future or merely a determination of what payments will be made in the future if plaintiffs elect to accept payments in installments as they were entitled to with normal and regular pension payments.

So as to counsel fees, again I ask that counsel discuss the matter and see if they can agree upon a number and that should be inserted. If you can't agree then the judgment should provide that that issue should be referred to the Magistrate for report and recommendation.

APPENDIX "C"
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 29, 1982

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LUCIA NOVEMBRE and ANN DELUCA,

Plaintiffs-Appellees,

v.

LOCAL 584 PENSION TRUST FUND AND WELFARE TRUST FUND, et al.,

Defendants-Appellants.

No.81-2362

No.81-2363

Submitted Under Third Circuit Rule 12(6) July 21, 1982

Before: ADAMS and HIGGINBOTHAM, Circuit Judges, and TEITELBAUM, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

s/ Arlin M. Adams
Circuit Judge

ATTEST:

s/ Sally Mrvos
Clerk

DATED: July 29, 1982

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*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX "D"
STATUTORY PROVISIONS INVOLVED

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29 U.S.C. §186 provides in pertinent part that:

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

***

(c) The provisions of this section shall not be applicable...

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employer making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis

on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities...."

29 U.S.C. §1102 provides in pertinent part that:

"(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

***

(b) Every employee benefit plan shall--...

(4) specify the basis on which payments are made to and from the plan,"

29 U.S.C. §1104 provides in pertinent part that:

"(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

***

(D) In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter."

No. 82-737

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ICE CREAM INDUSTRY DRIVERS and ICE CREAM EMPLOYEES UNIONS PENSION FUND ("THE ICE CREAM FUND"),

Petitioners,

vs.

LUCIA NOVEMBRE and ANN DELUCA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief on Behalf of Respondents in Opposition to a Petition for Writ of Certiorari

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QUESTION PRESENTED

Under the facts and circumstances of this case, did the District Court err in estopping Defendant Pension Fund from denying pension benefits to plaintiffs?

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COUNTER STATEMENT OF THE CASE

On July 17, 1950 plaintiff Lucia Novembre went to work for Consumer's Dairy in Union City, New Jersey as an office clerical worker. At that time and until the merger hereafter mentioned the office workers were covered by a collective bargaining agreement between Consumer's Dairy and Local 680. Plaintiff Lucia Novembre was or became a Local 680 member. Starting in 1956 and until the merger hereinafter mentioned the collective bargaining agreement required payment of and Consumer's Dairy did pay pension contributions to Petitioner, Ice Cream Industry Fund for and on behalf of Lucia Novembre.

In October 1, 1958 Consumer's Dairy moved to Newark, New Jersey; thereafter plaintiff Novembre travelled daily from her home in Union City to

Newark, New Jersey.

Effective January 1, 1966 Consumer's was merged into Sealest - the latter taking over all of the operations of Consumer's. For some time prior to January 1, 1966 the Consumer's Dairy employees felt uncertain regarding their employment status after the Sealtest takeover. The Sealtest employees and operation were covered by a collective bargaining agreement with Union Local 607, I.B.T. Therefore, the Consumer employees - members of Local 680 - were deeply concerned regarding their seniority status, pension rights, etc. after the Sealtest - 607 takeover. In order to allay these fears and uncertainties Local 680 sponsored a dinner meeting at the Essex House in Newark, New Jersey on December 28, 1965. All of the drivers, platform, plant and office workers effected by the merger

were invited; approximately 40 attended including plaintiffs.

At this point it is important to note the Union officers and Pension Fund trustees in attendance, on the dais and who spoke, namely:

> Lawrence W. McGinley - President of Local 680 from 1937 to his retirement on December 31, 1972; trustee of the Ice Cream Fund from 1951 to December 31, 1972; trustee of the Milk Industry Fund and its offspring, the 680 Milk Fund from 1949 to December 31, 1972. Mr. McGinley was instrumental in establishing the Milk Industry Fund (A223), the 680 Milk Fund; the establishment of the Ice Cream Fund.
>
> Sidney Bornstein Secretary-Treasurer of Local 607 and trustee of the MIlk Industry Fund.
>
> Tony Iorio - Business agent of Local 680 from January 1, 1952 to December 1973; trustee of the Ice Cream Fund from 1963 to December 1973; Mr. Iorio was also trustee of the Local 680 Milk Fund from 1962 to 1973.

As found by the Trial Court, Mr. McGinley "made a statement to everyone present that the employees would

carry-over their seniority, pay scale and pension credits from Local 680 into Local 607. He informed the audience that there would be no break in their pension benefits...Mr. Iorio made a similar statement which was repeated by Mr. Bornstein. In effect all three gentlemen reiterated that the employees would carry with them their pension benefits. There was no distinction made between what would transpire in respect to the benefits of the drivers as compared to the office workers."(PA9)*

The Trial Court continued (PA9):

> "After the public statements were made the plaintiffs had a private conversation with Mr. Bornstein and Mr. Iorio wherein they both confirmed and reiterated what had been stated publicly, namely, that the employees would carry their pension credits with them into the 607 Local."

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*Refers to Petitioners Appendix.

Starting January 1, 1966 plaintiff Lucia Novembre worked for Sealtest in Newark, New Jersey and became a member of Union Local 607. The collective bargaining agreement between Sealtest and Local 607 required the payment of pension contributions and Sealtest did pay pension contributions, for and on behalf of plaintiff Novembre to the Milk Industry Drivers and Dairy Employees Union Pension & Welfare Fund (Milk Industry Fund). On November 3, 1967, Sealtest moved to the Bronx. Again plaintiff Novembre travelled daily from Union City to her job with Sealtest in the Bronx.*

On February 6, 1970 Sealtest moved to Richmond Hills, Long Island. Again plaintiff Novembre travelled to her job

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*Neither plaintiff drives a car; they rely on public transportation.

from Union City to Richmond Hills even though it took her four to five hours a day travelling via two buses and a train, to and fro.

In 1971, Union Local 607 was merged into defendant Local 584. Also in 1971, the Milk Industry Fund was absorbed by the defendant, Local 584 Pension Trust Fund and Welfare Trust Fund (Local 584 Fund) through merger. Therefore, in 1971, plaintiffs, while working for Sealtest, became members of Local 584 and after 1971 pension contributions on behalf of plaintiff were made by Sealtest into the defendant Local 584 Fund.

On or just prior to November 8, 1974, Sealtest was acquired by Dellwood which moved the operation to Yonkers, New York. The Dellwood operation was covered by another Union Local. Plaintiffs' employment at Dellwood would

have meant a $30.00 cut in pay and the non-recognition of plaintiffs' accrued pension credits. In view of this plaintiffs refused to go to work at Dellwood. Plaintiffs last date of employment at Sealtest was November 8, 1974.

Thus, in reliance upon the representations of McGinley, Iorio and Bornstein, plaintiffs did not seek employment with employers contributing to the Ice Cream Fund although such employment was available; but went to great lengths and inconvenience to retain their position with Sealtest--all in an attempt to preserve their promised pension credits.

Plaintiff DeLuca's employment, union affiliations, employer and union transfers, experience at the December 18, 1965 dinner meeting, pension contributions on her behalf by her

respective employers to the respective pension funds, etc. were the same as co-plaintiff Novembre except that DeLuca was employed by Consumer's Dairy for the period November 1958 to January 1966 and by Sealtest for the period January 1, 1966 to November 1, 1974.

At this point it is important to note the history and inter-relationships of the various pension funds:

HISTORY OF DEFENDANT PENSION FUNDS

On October 24, 1957, and prior thereto, the Milk Industry Drivers & Dairy Employees Unions Pension and Welfare Funds (Milk Industry Fund) constituted a multi-employer/multi-union labor-management fund including (among others) Union Locals 584, 602, 607 and 680. Employers having collective bargaining agreements with said respective Locals paid pension contributions, on behalf of their

covered employees, into said Milk Industry Fund. Six of the ten union trustees administering said Fund were officials of 584, 607 and/680. Lawrence W. McGinley of 680 and John Kelly of 584 were two; Sidney Bornstein of 607 was one of the Union Trustees of said Fund, at least since November 10, 1970.

Effective June 1, 1962, Local 680 separated from said Milk Industry Fund and formed the "Milk Industry - Local 680 Pension and Welfare Fund" (680 Milk Fund). Lawrence W. McGinley was one of the union trustees of said Fund. At the same time, the Milk Industry Fund and the 680 Milk Fund executed a Reciprocity Agreement; i.e., pension credits earned in each Fund are combined in computing the employees' pension eligibility.

The Milk Industry Fund continued as a multi-employer/Locals 584, 602 and 607 Fund until December 3, 1971, when

584 absorbed Locals 607 and 602 through merger. The defendant Local 584 Pension Fund is the successor in interest to the Milk Industry Fund and assumed the obligations of the Milk Industry Fund. John Kelly remained as Trustee of the 584 Pension Fund.

Meanwhile, on October 26, 1964, the 680 Milk Fund had entered into a Reciprocity Agreement with the defendant Ice Cream Industry Pension Fund. Lawrence W. McGinley was one of the trustees of the defendant Ice Cream Fund. Thus all these Funds with interrelated trustees had reciprocity agreements with the lone exception of defendants Ice Cream and 584 Funds.

As we have already stated, on or about November 8, 1974, plaintiffs' employer Sealtest went out of business and plaintiffs found themselves unemployed. Each plaintiff filed an

application with the defendant Funds for a pension, i.e., an early retirement pension. At the time, plaintiff Novembre was fifty-five (55) years of age while plaintiff DeLuca was fifty-eight (58) years of age. Based upon their respective periods of employment, the plaintiffs earned the following pension credits:

	ICE CREAM FUND	584 FUND	TOTAL
Novembre	15 5/12	8 10/12	24 3/12
DeLuca	7 2/12	8 10/12	16

The defendant Funds denied plaintiffs' application for an early retirement pension on the ground that neither plaintiff had the necessary fifteen (15) years of pension credit with either pension Fund - standing alone; and that the pension credits of plaintiffs with each Fund could not, or would not, be combined for the purpose of pension eligibility.

If, as represented by Messrs. McGinley, Iorio and Bornstein at the dinner meeting, plaintiffs' pension credits carried over to Sealtest/584 Fund then plaintiffs would qualify for an early retirement pension, i.e., as of the date of the application they were both over fifty-five (55) years of age and had at least fifteen (15) years of pension credits. Therefore, plaintiffs instituted this suit against defendants for damages on the grounds of misrepresentation and estoppel.

For the reasons set forth in the opinions of the District Court, judgment in favor of plaintiffs and against the defendants, was entered by the District Court. (PA1 et seq and PB1 et seq) The co-defendants, Union Local 584 and Local 584 Fund, paid its pro rata share of the judgment.

Petitioner, Ice Cream Fund and

defendant, Local 680, appealed to the United States Court of Appeals for the Third Circuit. On July 29, 1982, the Third Circuit affirmed the District Court judgment.

REASONS WHY CAUSE SHOULD NOT BE REVIEWED

The District Court applied an estoppel to bar Petitioner, Ice Cream Fund from denying the existence of a reciprocity agreement between it and the co-defendant 584 Fund. This is in the nature of a promissory estoppel. Restatement of Contracts, section 90. Review by this Court of the cause is not necessary because (1) the District Court properly exercised its equitable powers to estop petitioner from denying the existence of reciprocity under the unusal facts and circumstances of this case; (2) the Federal cases declining to apply estoppel against a pension fund

are inapposite; (3) there is no conflict in the Circuits on the issue presented in this case; and (4) this Court has denied review in the similar case of Rosen v. Hotel & Restaurant Employees Union, Local 274, 637 F.2d 592 (3rd Cir.), cert. denied, 102 S.Ct. 398(1981).

A. The "illegality" or "actuarily soundness" basis of those Federal cases which decline to apply estoppel, are not in point here.

Those Circuits which have declined to apply estoppel against the pension fund, have done so on one or both of two bases, to wit:

1. Estoppel against a pension fund would compel the trustees to do an "illegal act." Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1109 (9th Cir. 1976); and

2. A concern that to permit

estoppel might jeopardize the "actuarily soundness" of the fund by imposing liabilities unforeseen by the fund's actuary. Phillips v. Kennedy, 542 F.2d 52,55 at footnote 8, (8th Cir.1976); Moglia v. Geohegan, 403 F.2d 110,116 (2nd Cir. 1968) Cert. denied, 394 U.S. 919 (1969); Hodgins v. Central States Pension Fund, 94 LLRM 2507 (E.D. Mich.1976); Atkin v. IP & GCU Employer Retirement Fund, 604 F2d. 1261,1267-1268 (9th Cir. 1980).

Section 302(c)(5)(B) of the Labor-Management Relations Act (LMRA), 29 U.S.C., Section 186(c)(5)(B) requires that contributions to a pension fund must be made under a "written agreement" and used "for the sole and exclusive benefit of the employees of (the) employer, and their families and dependants".

The "illegal act" which estoppel would force upon trustees, according to

these authorities is: the acceptance of contributions by the Fund from or on behalf of an employee not covered by the Labor Agreement and/or the granting of a pension to such non-covered employee (as in Moglia and Aitkin); or similarly, the acceptance of contributions by a pension fund from, and the granting of a pension to, an employee for and during a period of non-covered employment (as in Thurber and Phillips), would violate Section 306(c)(5)(B).

However, in the case at bar, plaintiffs were covered by a collective bargaining agreement during their entire term of employment with Consumers and Sealtest. The payments made on their behalf by their employers to the respective Funds were made in accordance with a "written agreement" and were in full compliance with Section 302(c)(5)(B).

Therefore, in the case at bar the application of estoppel as against Ice Cream Fund would not compel the trustees to perform an "illegal act".

Nor will the application of estoppel against Petitioner Fund affect its actuarial soundness. The defendant Funds in effect were estopped to deny the existence of the reciprocal agreements which they represented existed. Therefore, defendant Funds were required to pay their Pro-rata share of plaintiffs' respective pensions based upon the benefit level of each Fund for "early retirees". Thus Petitioner must assume 15 5/12ths over 24 3/12ths of the benefit Novembre would have received if she spent the entire 24 3/12ths years with the Ice Cream Fund. Similarly, the Ice Cream Fund must assume 7 2/12ths over 16 of the early retirement pension DeLuca would have

received if she spent the entire 16 years with the Ice Cream Fund. The Ice Cream Fund received pension contributions for each plaintiff covering this exact period. Therefore, the actuarial status or soundness of the Ice Cream Fund will not be affected in anyway. See Rosen, supra, 637 F.2d at p.598.

Moreover, Mr. McGinley told the Trial Court that the actuaries of the Ice Cream Fund had advised the Fund Trustees that the cost of a reciprocal agreement covering plaintiffs would be "minimal."

B. There is no conflict in the Circuits on the issue presented in this case.

We have already discussed the unusual factual situation in the case at bar which compelled the District Court to apply estoppel against the Defendant

Funds. For this reason and the additional reasons discussed under subheading A above, none of the authorities (see Petition pages 12 and 13) discussed this particular issue. Furthermore, the great majority of these cases did not hold that estoppel cannot be applied against a pension fund in a proper case.

The 9th Circuit in Aitkin felt bound by the previous decision in Thurber; however, the Aitkin opinion makes it clear that the Court was "inclined" to apply estoppel against the Fund for the same reasons discussed by the District Court.

In Reiherzer v. Shannon, 581 F2d 1266,1267, footnote 1 (7th Cir. 1978) the Court did not hold that estoppel could not be applied against the Fund, but in a footnote indicated "serious doubts" as to the advisability of

employing estoppel against a Fund.

The oft-cited pronouncement in Phillips v. Kennedy, supra, is pure dicta. In Phillips the Court found in favor of plaintiff--pensioner on the ground that the trustees' denial of the pension was arbitrary and capricious. The Court declined to decide the case on the basis of estoppel. The oft-quoted language of the Court declining to apply estoppel is contained in a footnote. (542 F.2d 55 @ n.8)

Many of the cases found estoppel to be inapplicable since the Court found one or more of its elements had not been established: Feathers v. UMW Health & Retirement Funds, 99 LLRM 2287, 2290 (D.D.C.1978) held that plaintiff failed "to establish any actual evidence of detrimental reliance"; for the same reasons estoppel was rejected in VanGunten v. Central States Etc., 622

F.2d 586,589 (6th Cir. 1982); Haeberle v. Board of Trustees Etc., 624 F.2d 1132,1139 and Michota v. Anheiser Busch, 526 F.Sup. 299, 317, footnote 23 (D.C.NJ 1980)[3]

C. Federal Courts have the equitable power to apply estoppel against a Pension Fund where the facts warrant same.

The 3rd Circuit in Rosen followed Scheuer v. Central States Pension Fund, 358 F. Supp.1332 (E.D. Wisc. 1973), on Rehearing 394 F. Supp. 193 (E.D.Wisc.1975), Aff'd, 570 F.2d 347 (7th Cir.1977) which had a similar factual situation. The 7th Circuit in Scheuer said

"' The sui generis nature of the

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[3]Of course, if Michota's denial of a pension was on the sole issue of estoppel, then the Michota case must be deemed to have been overruled by Rosen, supra.

> pension agreement...should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds...If anything, estoppel is appropriate here. The complexity of the typical fund agreement and the trustees' freedom to decide as they wish make it unlikely that workers will disregard promises made to them.' The hardship inflicted on those who rely upon promises is often severe." Scheuer, 358 F. Supp. at p.1338 quoted in Rosen, 637 F.2d at p. 598.

Moreover Federal Courts have broad equitable powers to grant and/or fashion relief to carry out the congressional intent. J.I.Case Co. v. Borak, 377 U.S.426,433 (1964).

The dictum in Phillips v. Kennedy, supra, that estoppel against a pension fund may be applied in "extraordinary circumstances" is but another expression of this equitable doctrine.

CONCLUSION

For the reason expressed above this cause should not be reviewed by this Court.

Respectfully submitted,

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